Petition

81-1658

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No.

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM 1981

DENISE MONACO,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the Feres doctrine preclude petitioner's claims from being heard on the merits, even though petitioner has never been a member of the Armed Services and was not even born until after her father's departure from the military?

2. Must the petitioner be denied a hearing on the merits of her claim solely because she is the daughter of a former member of the armed forces?

3. Did the petitioner suffer a direct injury due to the negligence of the respondent?

4. Is is true, as the Ninth Circuit suggested, that for serious claims such as petitioner's the only "hope" is that Congress will be moved to amend the Federal Tort Claims Act?

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DENISE MONACO,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT
OF CERTIORARI TO THE
UNITED STATES COURT
OF APPEALS FOR THE
NINTH CIRCUIT

Petitioner Denis Monaco respectfully prays that a Writ of Certiorari issue to review the decision rendered by the Ninth Circuit Court of Appeals on

November 9, 1981, rehearing denied on December 14, 1981.

PARTIES

Petitioner Denise Monaco was one of the appellants in the Ninth Circuit and plaintiffs in the District Court.[1/]

OPINIONS BELOW

The opinion of the trial court is attached as Appendix A. The opinion of the Ninth Circuit, reported at 661 F.2d 129 (9th Cir. 1981), is attached as Appendix B.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND LAWS INVOLVED

This case involves the Federal Tort Claims Act (28 U.S.C. §1346, 2671, et seq.), which makes the United States liable

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[1/] The other plaintiff/appellant, Daniel J. Monaco (Denise's father) does not seek further review as to the decision in this case.

generally for "injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment."

STATEMENT OF THE CASE

Petitioner Denise Monaco is the daughter of a military veteran. Her father Daniel Monaco was exposed, while in the military service, to massive does of radiation in connection with tests conducted during the "Manhattan Project" in Chicago. Ironically, Daniel's exposure had nothing to do with his military duties. He was not personally involved in the Project itself. Rather, his exposure resulted because he was required to exercise in Alonzo Stagg Stadium, which happened to be located immediately above the "Manhattan Project" test site in Chicago.

Daniel's exposure led to no immediate

injuries. However, that exposure both gave him cancer in his later years, and induced in him deleterious genetic changes. As a result of these changes, Daniel's daughter, Denise, was born with congenital arteriovenous anomaly in the brain. Denise's congenital condition has caused her three brain hemmorrages, aphasia and other permanent injuries.

Denise has never been in the service. She was born in July, 1953, several years after her father's discharge from the service. She has (according to the allegations in the complaint) been dramatically and permanently injured by the negligence of the United States.

This action was brought after denial of administrative remedies under the Federal Tort Claims Act (hereinafter "FTCA"). In the trial court, the Government brought a motion to dismiss based

upon the Feres doctrine (Feres v. United States, 340 U.S. 135 (1950)), contending that Denise's claim was derivative because it rested on the same allegations of negligence as the claim of her father, Daniel.

The district court dismissed Denise's suit. The Court first cited to this Court's holding in Feres, that:

> [T]he Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.

He then noted that although Denise "is not and never was a member of the military":

> The test of Feres is whether plaintiff's injuries have as their genesis injuries allegedly sustained incident to the performance of military service.

He therefore concluded:

> This court finds that Denise E. Monaco's injuries are directly related to and arise out of the injuries sustained by her father at the time he was a member of the United

> States Army. Her claim is therefore barred by Feres and Van Sickel and must be dismissed.

The Ninth Circuit affirmed the trial court's dismissal, feeling constrained by the Feres doctrine to do so. The Court noted, at p. 134:

> The Feres doctrine today stands on shaky ground with its precise justification somewhat confused. But the doctrine has been applied consistently to avoid examining acts of military personnel which were allegedly negligent with respect to other members of the armed services. While the injuries claimed by the Monacos may well have become manifest long after Daniel left the service, a court could not rule on either claim without examining acts occurring while Daniel was in the service. The result in this case disturbs us, particularly with respect to Denise. In her case, the price of avoiding examination of events long past, and involving her behavior in no respect, appears to be complete denial of recovery. If developed doctrine did not bind us we might be inclined to make an exception in cases such as this. Unfortunately, we are bound, and the decision of the district court must accordingly be AFFIRMED.

The Ninth Circuit went on in a footnote

to suggest that Denise should pursue legislative remedies by way of private bill or otherwise. The Court recognized, however, that one of the purposes of the FTCA was to eliminate the need for such private bills:

> In fact, courts have suggested that Congress passed the FTCA to relieve itself from a deluge of private bills seeking relief for citizens injured by the actions of a government employee. Feres, 340 U.S. at 140-41, 71 S.Ct. at 156-57, 98 L.Ed. at 158, Agent Orange, 506 F.Supp. at 769. Perhaps if Congress is made aware of the seriousness of claims such as Denise's it will be moved to grant relief to the individuals who request it, or to change the FTCA to allow such recoveries in the federal courts. We sincerely hope Congress will do at least the former. (Id., at p. 134, fn. 3)

It is respectfully suggested that Denise's claim does not require resort to legislation. The Feres doctrine, when carefully analyzed in light of this Honorable Court's decision in Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977) does not bar Denise's

claim. The FTCA, by its own terms, allows it. Her case should not have been dismissed.

ARGUMENT

I

THE FERES DOCTRINE LIMITING THE SCOPE OF THE F.T.C.A. DOES NOT APPLY TO PETITIONER

Denise Moncao's claim should not have been dismissed on the basis of the Feres doctrine. This is true for two reasons, both rejected by the Ninth Circuit:

A. The Feres doctrine, as articulated in Stencel, does not bar the claims of children such as Denise; and

B. Denise's injury was a direct injury to her, and did not have as its "genesis" any injury sustained by her father while he was in the service.

A. The Rationale of Stencel Allows Denise's Claim

The United States Supreme Court in Feres stated that the government is immune from suit "for injuries to servicemen where the injuries arise out of or

are in the course of activity incident to service". Id. at 146, emphasis supplied.

The rationale for this decision was specifically articulated in this Court's decision in Stencel Aero Engineering Corp. v. U.S., 431 U.S. 666 (1977). In Stencel, an on-duty serviceman was injured during flight training. He brought an action against the United States and the contractor that manufactured the equipment which allegedly caused his injuries. The contractor cross-claimed for indemnity from the United States. Summary judgment for the United States on the indemnity claim was affirmed. The court reasoned that because the serviceman's claim was barred as "incident to military service", there could be no indemnity arising out of the barred claim. Three cirteria were laid down in Stencel justifying application of the Feres doctrine:

> First, the relationship between the Government and members of its Armed Forces is 'distinctively federal in character.' . . . it would make little sense to have the Government's liability to members of the Armed Services dependent on the fortuity of where the soldier happened to be stationed at the time of the injury. Second, the Veterans' Benefits Act establishes, as a substitute for tort liability, a statutory 'no fault' compensation scheme which provides generous pensions to injured servicemen, without regard to any negligence attributable to the Government. A third factor was explicated in United States v. Brown, . . . namely '[t]he peculiar and special relationship of the soldier to his superiors, and effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty . . .' [citations omitted]. Stencel, at pp. 671-72.

While Stencel expanded the exclusionary impact of Feres, by applying it to derivative indemnity claims, Stencel also limited the future impact of the exclusion by clearly defining the criteria justifying its use. Implicit in Stencel is the suggestion that in any case not involving

a serviceman's claim per se, the three criteria should be evaluated when determining FTCA coverage. This the Ninth Circuit failed to do.

When the Stencel criteria are considered, it becomes clear that Denise's claim should not be excluded from the ambit of the FTCA. Denise has no relationship with the government which is distinctly federal in character; she cannot avail herself of V.A. benefits; and any adverse effect on military discipline would be tenuous at best.

The extent to which Feres and Stencel bar claims of civilian family members of former servicemen was addressed in Hinkie v. United States, 524 F.Supp. 277 (E.D.Pa. 1981). In Hinkie, as in the case at bar, it was alleged that chromosomal damage to an irradiated serviceman caused his children to suffer birth defects. Judge Shapiro held that

the first two factors in Stencel (uniquely federal relationship and existence of V.A. benefits) provided no rationale for barring the family members' claims. She then considered the third factor:

> The third factor considered in Stencel, the effect of the lawsuit upon military discipline, presents a more difficult issue. . . . In this case the trial would involve testimony of Armed Service members regarding each other's decisions and, perhaps, the "second-guessing" of military orders. However, we do not find that that fact, standing alone, warrants dismissal under Feres or Stencel, since it is difficult to see how this lawsuit would aversely effect military discipline. The injuries claimed were not apparent at the time the military orders were given nor soon thereafter. The plaintiffs' injuries, concededly derived from those to Hinkie, Sr. when in military service, manifested themselves decades after his discharge. The program of which the Teapot Dome tests were a part has long since ended. The undermining of discipline or refusal to follow orders present less of a problem because of the time lapse here involved.
>
> Moreover, adverse effects on military discipline must not flow inevitably from the judicial scrutiny of a military order, for such scrutiny

> is no less involved in other suits under the FTCA which Congress has not barred. An example would be an action by civilians injured by nuclear testing near their residences. Id. at p. 284.

Judge Shapiro found that, on balance, the Stencel criteria did not mandate dismissal of the children's claims.

In a slightly different setting, another Court addressed the family-member issue and found Feres/Stencel inapplicable. Sigler v. LeVan, 485 F.Supp. 185 (D.Md., 1980) considered constitutional claims, as well as claims for conversion and replevin, brought by the widow and daughter of a deceased serviceman. Chief Judge Northrop found that Feres should not bar such claims:

> It would be manifestly unjust to allow the military to use the Feres doctrine to shield itself from liability when it injures a civilian. Civilian relatives of military personnel are not stripped of their constitutional and state law rights merely because of their relationships with servicemen . . .

> As this Court stated earlier, Feres applies only when military personnel are injured incident to service by governmental or other military personnel. Mrs. Sigler and her daughter are civilians. The Feres doctrine simply does not apply when a civilian relative of a serviceman has been injured by actions of military personnel. . .
>
> While the alleged injuries to Mrs. Sigler and her daughter arose out of the same factual scenario as the alleged injuries to Mr. Sigler, their injuries are distinct. Feres does not apply to their claims. Id., at 198.

The Sigler claims were later dismissed in a supplemental opinion on grounds unrelated to Feres immunity doctrine.

Under the Stencel rationale, all three factors should be considered in determining whether an exception to the FTCA has been carved out. In this case, only one of those factors even arguably presents a problem. Hence, on balance and in light of the justifications underlying the Supreme Court cases relied upon here, Denise's action should not have been foreclosed in its infancy. Because the

Ninth Circuit did not consider all three of the Stencel criteria, it is respectfully requested that this Court issue its writ of certeriori directing it to do so.

B. Denise's Injuries Are Direct to Her, Not Derivative of Injuries Sustained By Her Father While In The Military

Even under the broadest reading of Feres Denise Monaco's injuries are clearly separate and apart from any injuries sustained by her father while in the service. Hence, Feres by its own terms should not apply.

As noted above, the trial court believed that:

> The test of Feres is whether plaintiff's injuries have as their genesis injuries allegedly sustained incident to the performance of military service. (Appendix A, page 5; emphasis supplied)

He went on to conclude that Denise's congenital condition had as its "genesis" injuries sustained by her father while

on active duty -- presumably, his exposure to radiation. The Ninth Circuit apparently adopted this reasoning in its opinion.

However, as would be brought out more fully at a trial on the merits, Denise's injuries (her congenital condition) are not derivative of any injuries suffered by her father. Rather, they are injuries distinct to her and suffered only by her.

Denise's father was exposed to radiation years before she was born. This radiation altered his genetic structure, but that alteration was not an "injury" to him within the meaning of Feres. Rather, it was simply a change in him. The change did not damage his health.[2/]

[2/] Daniel Monaco was also himself injured, in that he later developed cancer as a result of his exposure. That injury, however, is unrelated to Denise's; Denise's claim is no different than it would be had her father been otherwise unaffected by the radiation.

Rather, the change manifested itself -- and the single relevant "injury" occurred -- only after Denise's birth. Her father was doubtless a conduit for the realization of that injury, but that injury was separate and apart from specific injury to him.

Denise's situation is analytically similar to the following example: A serviceman and his son are standing on a pier operated by the U.S. Navy. A negligent sailor carelessly loosens a barrel on the pier, sending it crashing into the serviceman/father. He, in turn, collides with his son, pushing him into the water and injuring him. In this situation, the son clearly has a direct action under the FTCA, unbarred by Feres. While his father was an instrumentality of his injury, and while his father may himself have been injured in the accident, the son's injuries are separate, distinct

and not "derivative" in any way.

So, too, are Denise Monaco's injuries separate, distinct and non-derivative. In this respect, Denise's claims (and the claims of the boy in the example given) are quite different from those pressed in Van Sickel v. United States, 285 F.2d 87 (9th Cir. 1960), which involved an action for the wrongful death of a serviceman, brought by his survivors. The wrongful death claim, while legally belonging only to the non-military survivors, was obviously derivative of the injuries suffered by the serviceman. Van Sickel thus involved the same kind of derivative claim as did the indemnity action in Stencel.

Denise Monaco suffered severe, debilitating and quite personal injuries, entirely separate from any injuries suffered by her father. The Feres doctrine should not bar these claims, and it is respectfully requested that this Court so direct

the Ninth Circuit.

II

THE SCOPE OF THE FERES/STENCEL DOCTRINE IS PRESENTLY UNCLEAR AND SHOULD BE RESOLVED

In the case at bar, the Ninth Circuit expressed serious concern over the harsh effects of the application of Feres to Denise Monaco's claim. (Monaco, supra, 661 F.2d at 134). The Court further noted the "confusion" surrounding the doctrine's justification and scope. There is substantial variance -- and confusion -- in several district and circuit courts concerning the reach of the Feres/Stencel doctrine. Particularly since this doctrine has developed through case law in this Court, rather than through legislation, it is appropriate for this Court to specify the effects of the Feres/Stencel rationale on injured family members.

In similar situations, district courts in different circuits have reached opposite conclusions. In Hinkie, supra, for

example, an Eastern District of Pennsylvania court found genetic injuries to an irradiated serviceman's offspring not to be barred by Feres. However, a court in the Eastern District of New York found similar genetic damage claims related to Agent Orange contamination barred by Feres. See In re "Agent Orange" Product Litigation, 506 F.Supp. 762 (E.D. N.Y. 1980).

Additional confusion is created by the "exception" to Feres which has developed from this Court's decision in Brown v. United States, 348 U.S. 110 (1954), which allowed a serviceman's FTCA claim for post-discharge negligence. In applying this decision, lower courts have allowed injuries substantially similar to Denise Monaco's to proceed so long as a post-discharge failure to warn theory was alleged. See, for example, Broudy v. United States, 661 F.2d 125 (9th Cir.

1981), decided by the Ninth Circuit on the same day as Monaco. In Broudy, plaintiff's decedent was irradiated while in the service. Plaintiff alleged that after his discharge, the Government negligently failed to warn, monitor and treat him for the effects of the radiation. The Court found that this failure to warn could constitute a separate, post-discharge act of negligence. See also Thornwell v. United States, 471 F.Supp. 344 (D.D.C. 1979) (finding independent tort and granting recovery where Government deliberately refused to give claimant information on drug experiments performed on him in-service).

Petitioners believe that the Broudy and Thornwell cases were properly decided. It is suggested, however, that those situations are indistinguishable from Denise Monaco's as a matter of policy. Like the plaintiffs in Brown, Broudy and

and Thornwell, Denise Monaco was totally unrelated to the military service at the time of her injury. She had no "federal relationship;" she was entitled to no Veteran's benefits; and she could in no way affect the proper conduct of this nation's armed forces.

The twin purposes of the FTCA are compensation of tort victims and the elimination of the need for private bills. Neither of these purposes is served when confusion exists as to the scope of judicially-created exceptions to the Act. Nor is either of these purposes served when innocent victims such as Denise Monaco are denied rights because of "events long past, and involving her behavior in no respect." (Monaco, supra, at 134).

It is respectfully submitted that the Hinkie rationale properly limits the scope of Feres in cases such as Denise's.

It is respectfully requested that this Court so state, in order that conflicting decisions in the Courts below may be avoided.

CONCLUSION

Denise Monaco's exclusive legal remedy is under the FTCA. It is respectfully submitted that the Ninth Circuit, by improperly interpreting this Honorable Court's decisions in Feres and Stencel, has improperly denied Denise's only remedy. It is respectfully requested that this Court hear this petition and issue its writ of certiorari to the Ninth Circuit Court of Appeals directing entry of a judgment which will allow Denise's claims to be heard on the merits.

Dated: March 2, 1982

Respectfully submitted,
COTCHETT, DYER & ILLSTON

By SUSAN ILLSTON
SUSAN ILLSTON
Attorneys for Petitioner
DENISE MONACO

(Appendices Follow)

Appendix

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

DANIEL J. MONACO, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	NO. C-79-0859-SW
DENISE E. MONACO, Plaintiff, v. UNITED STATES OF AMERICA Defendant.	NO. C-79-0860-SW

[Filed: November 2, 1979]

ORDER OF DISMISSAL

These actions having come before the court on the Motion to Dismiss filed by defendant, United States of America, and upon consideration of the record and memoranda of the parties, and the court being fully advised in the premises, the court finds the following:

This action was brought under the pro-

visions of the Federal Tort Claims Act, 28 U.S.C. §1346(b). Plaintiff, Daniel J. Monaco, alleges injury from overexposure to radiation while he was serving as a member of the United States Army. The complaint alleges negligence of the United States and its agents and employees. Plaintiff, Denise E. Monaco, also sues under the Federal Tort Claims Act and alleges her injuries are the result of negligence of the United States and its agents and employees.

Defendant United States of America has moved to dismiss this action, contending that a person on active duty in the military cannot avail himself of the Federal Tort Claims Act when the injury is incident to plaintiff's military service. Defendant also contends Denise E. Monaco cannot seek relief under the Federal Tort Claims Act because her injuries have as their genesis injuries allegedly sustained incident to

the performance of military service.

Although the Federal Tort Claims Act waives sovereign immunity under certain circumstances, it does not do so for suits brought by servicemen injured incident to their military service. In Feres v. United States, 340 U.S. 135 (1950), the Supreme Court held that:

> [T]he Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. (Id. at 146.)

See also, United States v. Lee, 400 F.2d 558 (9th Cir. 1968), cert. denied, 393 U.S. 1053 (1969). The continuing vitality of the Feres doctrine was recognized by the Ninth Circuit as recently as May 21, 1979. Uptegrove v. United States, No. 77-1723, Slip Op. (9th Cir., May 21, 1979).

Plaintiff Daniel Monaco has attempted to avoid the bar of Feres by contending that his injury did not occur during his military service, but thirty years later.

The courts, however, have rejected the contention that an injury does not occur until its manifestations become apparent. The Supreme Court of Alabama, in an action involving injuries allegedly caused by exposure to radiation, held that the injury occurs at the time of radiation. Garrett v. Raytheon Company, Inc., 368 So. 2d 516 (Ala. 1979). In cases similar to the one at bar the issue has been whether the exposure arose out of or was incident to military service. The courts have held that Feres barred an action where plaintiff alleged an injury which resulted from overexposure to radiation incurred while he was a member of the United States Armed Forces. Dolliver v. United States, Civ. 77-2-659 (D. Colo. decided November 15, 1977); Jaffe, et al. v. United States, et al., 468 F.Supp. 632, 592 F.2d 712.

Although plaintiff Denise E. Monaco

is not and never was a member of the military her injuries arise out of those of her father. The test of Feres is whether plaintiff's injuries have as their genesis injuries allegedly sustained incident to the performance of military service. Both plaintiffs allege their injuries arise out of the exposure of Daniel Monaco to radiation during his military service. Additionally, the claim of Denise Monaco states in pertinent part:

> As a proximate result of the defendant's negligence plaintiff's father was afflicted with atomic radiation poisoning and has thereby suffered chromosomal and genetic change. As a further proximate result of the defendant's negligence, and the ensuing poisoning and chromosomal and genetic damage, plaintiff was born in the State of California on July 23, 1953, afflicted with a birth defect
> . . . .

The courts have held that an injury to one outside the military that has as its genesis the in-service injury of another

is also barred by the Feres doctrine. Van Sickel v. United States, 285 F.2d 87 (9th Cir. 1960). This court finds that Denise E. Monaco's injuries are directly related to and arise out of the injuries sustained by her father at the time he was a member of the United States Army. Her claim is therefore barred by Feres and Van Sickel and must be dismissed.

IT IS SO ORDERED.

DATED: 10/31/79

/s/ SPENCER WILLIAMS
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 79-4787

DANIEL J. MONACO and DENISE E. MONACO,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the
United States District Court
for the Northern District of
California

Argued and Submitted June 4, 1981

Decided November 9, 1981

Rehearing Denied December 14, 1981

Before NELSON and CANBY, Circuit Judges, and BATTIN,* District Judge.

NELSON, Circuit Judge:

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*Honorable James F. Battin, Chief Judge, United States District Court for the District of Montana, sitting by designation.

The appellants, Daniel J. Monaco and Denise E. Monaco [hereinafter "Daniel" and "Denise", respectively, or "the Monacos'], appeal from an order of the district court granting the motion of the United States to dismiss claims brought against it under the Federal Tort Claims Act [FTCA], 28 U.S.C. §§ 1346, 2671-2680 (1976 & Supp. 1979). The district court concluded that an exception to the FTCA for claims incident to military service barred the Monaco's claims and accordingly dismissed all claims for lack of subject matter jurisdiction. We affirm.

FACTS

During World War II, from May, 1943, until February, 1946, Daniel was stationed at the University of Chicago, where he participated in the Army Specialized Training Program. As part of the program, Daniel was required to perform calisthenic exercises at the University's football

field. During breaks, he relaxed on the stadium seats. Daniel concedes that he was engaged in active military service at the time.

The Monacos allege that while Daniel was involved in the program, experiments in atomic reactions were being conducted in a laboratory beneath the stadium in connection with the "Manhattan Project," the research and development of the world's first atomic weapon.[1] The Monacos were not apprised of Daniel's exposure to radiation until July of 1971 when they were informed that Daniel had contracted radiation induced cancer of the colon. They learned at the same time that the radiation induced a genetic change which caused Daniel's child Denise to be born with a birth defect known as arterio-venous anomaly in the

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1. For purposes of this appeal, we treat all of the Monacos' allegations as true. Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974).

brain. This defect has induced three brain hemorrhages, aphasia and other permanent injuries.

PROCEEDINGS BELOW

After denial of administrative claims, the Monacos filed complaints with the district court. Daniel filed the instant FTCA suit seeking $1,000,000 for the physical injury he suffered, as well as for the mental pain and suffering that was occasioned by his daughter's birth defect. The complaint alleges that the Government "knew or should have known of the danger posed" by exposing military personnel to atomic radiation, and that the Army was negligent in permitting exposure to radiation. Denise filed a separate FTCA action against the United States in which she also sought $1,000,000 in damages. Denise's complaint rests on the same allegations as her father's and alleges that the Government's negligence resulted in chromosomal and genetic

changes in her father which caused her to be born with the birth defect.

The Monacos' separate actions were consolidated for purposes of argument and decision. On November 2, 1979, the district court for the Northern District of California issued an Order dismissing both actions on the authority of Feres v. United States, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), and its progeny.

DISCUSSION

Traditional sovereign immunity has been waived for tort claims against the United States by the Federal Tort Claims Act, which exposes the Government to liability arising from personal injury or property damage caused by the negligence of any Government employee "acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance

with the law of the place where the act or omission occurred." 28 U.S.C. §1346(b) (1976). While the FTCA "waives the Government's immunity from suit in sweeping language," United States v. Yellow Cab Co., 340 U.S. 543, 547, 71 S.Ct. 399, 402, 95 L.Ed. 523, 528 (1951), a number of statutory and judicial exceptions limit the waiver, and if a claim falls within any such exception the court is without jurisdiction to hear the case. United States v. Orleans, 425 U.S. 807, 814, 96 S.Ct. 1971, 1976, 48 L.Ed.2d 390, 298 (1976); Dalehite v. United States, 346 U.S. 15, 30-31, 73 S.Ct. 956, 965-66, 97 L.Ed. 1427, 1438 (1953).

One exception to the waiver of immunity is for injuries to military personnel. In Feres v. United States, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), the Supreme Court denied recovery for injuries or fatalities

sustained by military personnel on active duty as a result of the negligence of others in the armed services. The Court concluded that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146, 71 S.Ct. at 159, 95 L.Ed. at 161.

The Supreme Court, in Feres and subsequent cases, has suggested several reasons for the military exception. Nothing that the FTCA only extends liability to the Government "in the same manner and to the same extent as a private individual under the circumstances," 28 U.S.C. §2674 (1976), the Court has concluded that there is no private liability parallel to one that might be found in the unique relationship between an armed service and its personnel. Feres, 340 U.S. at 141-42,

71 S.Ct. at 156-57, 95 L.Ed. 158-59; see also Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 671, 97 S.Ct. 2054, 2057-58, 52 L.Ed.2d 665, 670 (1977). The Supreme Court has noted three specific aspects of the relationship between an armed service and its personnel that make the relationship unique and application of the FTCA unwise. First, the Court has questioned the wisdom of allowing suits in the context of "the peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits . . . were allowed for negligent orders given or negligent acts in the course of military duty." United States v. Brown, 348 U.S. 110, 112, 75 S.Ct. 141, 143, 99 L.Ed. 139, 143 (1954) quoted in Stencel, 431 U.S. at 671-72, 97 S.Ct. at 2058, 53 L.Ed.2d at 670.

Second, the Court has noted that, as the FTCA requires application of the "law of the place where the act or omission occurred," 28 U.S.C. § 1346(b) (1976), recovery by military personnel would be "dependent upon geographic considerations over which they have no control and ... laws which fluctuate in existence and value." Feres, 340 U.S. at 143, 71 S.Ct. at 158, 95 L.Ed. at 159. The Court concluded that this would "hardly be a rational plan." Id.; see also Stencel, 431 U.S. at 671, 97 S.Ct. at 2057, 52 L.Ed.2d at 670. Finally, military personnel are afforded recovery pursuant to the Veterans' Benefits Act, 38 U.S.C. § 301-1008 (1976 & Supp. 1978), which provides "no fault" compensation as a substitute for tort liability and limits the extent of governmental liabilities for service-related injuries. The Court has concluded that a tort claim under the FTCA would

circumvent the limitation of the act and "judicially admit at the back door that which has been legislatively turned away at the front door." Stencel, 431 U.S. at 673, 97 S.Ct. at 2059, 52 L.Ed.2d at 671 (quoting Laird v. Nelms, 406 U.S. 797, 802, 92 S.Ct. 1899, 1902, 32 L.Ed.2d 499, 504 (1972)).

Despite the development of these elaborate policy reasons for the Feres doctrine the basis for the exception has recently become the subject of some confusion. In United States v. Muniz, 374 U.S. 150, 159-62, 83 S.Ct. 1850, 1856-58, 10 L.Ed.2d 805, 813-15 (1963), the Supreme Court appeared to question many of the reasons for the military exception and concluded that the decision was "best explained" by the special command relationship between soldiers and their superiors, 374 U.S. at 162, 83 S.Ct. at 1858, 10 L.Ed.2d at 815.

But in Stencel, 431 U.S. at 672-73, 97 S.Ct. at 2058-59, 52 L.Ed.2d at 670-72, the Supreme Court applied each of the factors summarized above in reaffirming and extending the Feres doctrine. And several cases in this circuit have held the military exception applicable even where there was no command relationship between the claimant and the individual tort-feasor. See Troglia v. United States, 602 F.2d 1334 (9th Cir. 1979); United States v. Lee, 400 F.2d 558 (9th Cir. 1968), cert. denied, 393 U.S. 1053, 89 S.Ct. 691, 21 L.Ed.2d 695 (1969).

This confusion has led to a widespread questioning of the Feres exception. See Hunt v. United States, 636 F.2d 580, 589 (D.C. Cir. 1980); Veillette v. United States, 615 F.2d 505, 506 (9th Cir. 1980) (applying Feres "reluctantly"); Parker v. United States, 611 F.2d 1007, 1010-11 (5th Cir. 1980); Note, from Feres

to Stencel: Should Military Personnel Have Access to FTCA Recovery? 77 Mich.L.Rev. 1099 (1979). Nevertheless, the exception has been applied consisently to deny recovery whenever injuries arise from actions incident to military service. See, e.g., Stanley v. CIA, 639 F.2d 1146 (5th Cir. 1981); Veillette, 615 F.2d at 507; Troglia, 602 F.2d at 1339; In re "Agent Orange" Product Liability Litigation, 506 F.Supp. 762 (E.D.N.Y. 1980). The most convincing explanation for the continued vitality of the Feres doctrine was given recently by the District of Columbia Circuit in Hunt v. United States, 636 F.2d at 599 (citations omitted):

> The protection of military discipline ... serves largely if not exclusively as the predicate for the Feres doctrine. Although the [Supreme] Court has woven a tangled web in its discussion of the "distinctly federal" notion and of the alternative compensation system, it has not wavered on the importance of maintaining discipline within the armed forces. The Court has found it

> unseemly to have military personnel, injured incident to their service, asserting claims that question the propriety of decisions or conduct by fellow members of the military. Only this factor can truly explain the Feres doctrine and the crucial line it draws ....

While this explanation is not fully convincing, especially in cases of litigation involving military personnel who never had a command relationship with one another, it does provide a consistent foundation for the decided cases.

While courts have applied the Feres doctrine broadly, the exception does not extend to all instances in which an injury is remotely related to activities incident to military service. Thus, in United States v. Brown, 348 U.S. 110, 75 S.Ct. 141, 99 L.Ed. 139 (1954), the Supreme Court allowed recovery for a discharged veteran who complained of receiving negligent treatment after his discharge for an injury received while

on active duty. The Court focused on when the negligent act took place and concluded that "[s]ince the negligent act giving rise to the injury in the present case was not incident to the military service," the plaintiff's claim was not barred. 348 U.S. at 113, 75 S.Ct. at 144, 99 L.Ed. at 144. Cf. Brooks v. United States, 337 U.S. 49, 69 S.Ct. 918, 93 L.Ed. 1200 (1949) (recovery allowed where claimant was struck by army vehicle while claimant was not on active duty). Thus any claimant whose injury was not the result of negligence occurring while on active duty should be allowed to recover. This result is consistent with the Hunt explanation that the Feres doctrine relies on the protection of military discipline. Charges of negligent acts taken when the claimant was not in the service cannot implicate any command decision involving the claimant.

A. Daniel Monaco's Claim for Recovery for his Cancer.

Daniel hopes to avoid the clear impact of Feres by claiming that his injury was his cancer, which manifested itself after he left the service, rather than his in-service exposure to radiation. That Daniel's injury did not occur until after he left the service does not, however, bring him within the analysis in Brown, as he claims. In Brown recovery was allowed, not because the injury occurred after the claimant left the service, but because the negligent act itself occurred post-service. Daniel's injury, by his own allegation, was the direct result of his exposure to radiation while in the service -- there is no allegation of post-service negligence.

Neither can the analysis in Brown be extended to include post-service injury resulting from in-service negligence. There is no salient difference between

a claim for injuries manifest before and injuries manifest after the claimant leaves the service. Indeed, it would be anomalous for recovery to hinge on the fact as fortuitous as when an injury becomes apparent. Daniel appears to argue that because his now a civilian, the concerns surrounding suits in the peculiar command relationships in the military are no longer significant. This argument is without merit. Courts have consisently denied claims of former military personnel, or their spouses or children who were never in the military. E.g., Feres,340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (two of the three cases involved in the decision were brought by widows); Uptegrove v. United States, 600 F.2d 1248 (9th Cir. 1979), cert. denied, 444 U.S. 1044, 100 S.Ct. 732, 62 L.Ed.2d 730 (1980); see also Stencel, 431 U.S. at 673, 97 S.Ct. at 2059, 52

L.Ed.2d at 671 (action brought by third-party indemnity plaintiff was held to have a negative effect on military discipline).

B. Denise Monaco's Claim for Recovery for her Birth Defect.

Denise attempts to escape the Feres doctrine and clear the way to recovery under the FTCA with two arguments. Her first argument is similar to that of her father, and must similarly be rejected. Specifically, Denise claims that her injury was not the result of an in-service injury because the chromosomal change in her father which induced the injury was no injury.

As indicated above, the proper focus in applying the Feres doctrine is not the time of injury, but the time of the negligent act. Whether Denise's injury "occurred" when she was born with a birth defect or when her father suffered chromosomal change,

the alleged negligent act drawn into question was performed while Daniel was in the service. Thus, just as Daniel could not recover on the grounds that his injury was post-service, we cannot grant Denise recovery on these grounds.[2]

Denise's second argument is that Feres does not block her claims because she was never a member of the armed forces. She argues that her claim can thus have no effect on discipline between soldiers and their superiors, and points out that she can recover no benefits under the Veterans' Benefit Act for her injuries.

The Supreme Court rejected both aspects of this argument in Stencel

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[2] Daniel asserts in one short paragraph that he also should be able to recover for his suffering due to Denise's injuries. But Daniel's concededly derivative claim is simply another injury in the line of causation from his initial in-service injury and Feres does not allow him to recover for it.

Aero Engineering Corp. v. United States, 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977). In Stencel the Court denied recovery by a third party against the United States for a claim seeking indemnity for any damages paid a serviceman. While the party seeking indemnity was not a member of the armed forces, the Court concluded:

> [W]here the case concerns an injury sustained by a soldier while on duty, the effect of the action upon military discipline is identical whether the suit is brought by the soldier directly or by a third party. The litigation would take virtually the identical form in either case, and at issue would be the degree of fault, if any, on the part of the Government's agents and the effect upon the serviceman's safety.

431 U.S. at 673, 97 S.Ct. at 2059, 52 L.Ed.2d at 671.

The Court similarly rejected the argument that non-military claimants should be entitled to recovery because

of their inability to collect compensation under the Veterans' Benefits Act. The Court noted that the act "clothes the Government in the 'protective mantle of the Act's limitation of liability provisions,'" and concluded that "[t]o permit the petitioner's claim would circumvent this limitation thereby frustrating one of the essential features of the Veterans' Benefits Act." 431 U.S. at 673, 97 S.Ct. at 2058-59, 52 L.Ed.2d 671 (quoting Cooper Stevedoring v. Kopke, Inc., 417 U.S. 106, 115, 94 S.Ct. 2174, 2179, 40 L.Ed.2d 694, 702(1974)).

Denise's case differs from Stencel in that she seeks relief for an injury to herself rather than indemnity for losses due to injury to her father, but this does not change the substantive analysis: the court still must examine the Government's activity in relation to military personnel on active duty. It is precisely this

type of examination the Feres doctrine seeks to avoid. Courts have reflected this analysis in several cases rejecting the claims of non-military plaintiffs seeking recovery for independent injuries stemming from allegedly negligent acts against military personnel. E.g., Van Sickel v. United States, 285 F.2d 87, 90 (9th Cir. 1960) (denying recovery for wrongful death action found to be "original and distinct cause of action granted to the heirs and personal representatives of the decedent to recover damages sustained by them"); In re "Agent Orange" Product Litigation, 506 F.Supp. 762 (E.D.N.Y. 1980) (denying recovery to children claiming for genetic injuries and birth defects caused by parents' exposure to Agent Orange); Harrison v. United States, 479 F.Supp. 529, 532-35 (D.Conn.1979), aff'd without opinion, 622 F.2d 573 (2d Cir. 1980) (wife's action for loss of consortium barred even

though her action was "for damages to her own interest, not a remote consequence of the tort-feasor's injury to the husband").

CONCLUSION

The Feres doctrine today stands on shaky ground with its precise justification somewhat confused. But the doctrine has been applied consistently to avoid examining acts of military personnel which were allegedly negligent with respect to other members of the armed services. While the injuries claimed by the Monacos may well have become manifest long after Daniel left the service, a court could not rule on either claim without examining acts occurring while Daniel was in the service. The result in this case disturbs us, particularly with respect to Denise. In her case, the price of avoiding examination of events long past, and involving her behavior in

no respect, appears to be complete denial of recovery. If developed doctrine did not bind us we might be inclined to make an exception in cases such as this. Unfortunately, we are bound, and the decision of the district court must accordingly be

AFFIRMED.[3]

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[3]We have held in this case that the doctrine of sovereign immunity prevents Denise from recovering for her injury in the federal courts, but we encourage Denise to pursue any legislative remedies available to her. That she will be able to recover through such channels is unclear, but not without hope. In fact, courts have suggested that Congress passed the FTCA to relieve itself from a deluge of private bills seeking relief for citizens injured by the actions of a government employee. Feres, 340 U.S. at 140-41, 71 S.Ct. at 156-57, 98 L.Ed. at 158; Agent Orange, 506 F.Supp. at 769. Perhaps if Congress is made aware of the seriousness of claims such as Denise's it will be moved to grant relief to the individuals who request it, or to change the FTCA to allow such recoveries in the federal courts. We sincerely hope Congress will do at least the former.

POS-1

PROOF OF SERVICE BY MAIL
PURSUANT TO 28 U.S.C.
and C.C.P. §§ 1013(a), 2015.5

I am a citzen of the United States; my business address is Suite 500, El Camino Real at Fourth Avenue, San Mateo, California, 94402; I am employed in the County of San Mateo, where this mailing occurs; I am over the age of eighteen years and not a party to the within cause. I served the within PETITION FOR WRIT OF CERTIORARI TO THE NINTH COURT OF APPEALS on the following persons on the date set forth below, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail-box in San Mateo, California, addressed as follows:

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT
7th and Massion Street
P.O. Box 547
San Francisco, California 94101

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///

HONORABLE SPENCER WILLIAMS
JUDGE OF THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA
450 Golden Gate Avenue
San Francisco, CA 94102

SOLICITOR GENERAL
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Washington, D.C. 20530

I certify or declare under penalty of perjury that the foregoing is true and correct. Executed on March 2, 1982 at San Mateo, California

Mary T. Cesped
Mary T. Cesped

Opposition

Office - Supreme Court, U.S.
FILED
MAY 3 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1658

In the Supreme Court of the United States

OCTOBER TERM, 1981

DENISE MONACO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1658

DENISE MONACO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, who alleges that she suffered a birth defect as a result of her father's exposure to nuclear radiation while he was on active duty in the United States Army, contends that the courts below erred in ruling that the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950), bars her Federal Tort Claims Act suit against the United States.

1. Petitioner and her father, Daniel Monaco, brought actions under the Federal Tort Claims Act in the United States District Court for the Northern District of California. They alleged that Daniel Monaco, while on active duty in the Army from May 1943 to February 1946, was required as part of his training to perform calisthenic exercises on Stagg Field at the University of Chicago. During breaks he relaxed in the stadium seats. At this time, the Manhattan Project—the research and development of the world's first

atomic weapon—was being conducted in laboratories beneath Stagg Field. Petitioner and her father alleged that in this way the Army negligently exposed Daniel Monaco to excessive radiation that caused him to suffer both cancer of the colon and "chromosomal and genetic changes."[1] The genetic damage, they alleged, caused petitioner's birth defect (Pet. App. B-2 to B-5).

The district court ruled that *Feres*, which bars servicemen's suits against the United States for damages resulting from service-related injuries, precluded Daniel Monaco's suit (Pet. App. A-3 to A-5). Because petitioner's alleged injury was "directly related to and [arose] out of the injuries sustained by her father at the time he was a member of the United States Army" (*id.* at A-6), the district court held that the principles underlying *Feres* barred petitioner's claim as well.

The court of appeals affirmed the dismissal of both complaints.[2] It relied on *Feres* and on *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666 (1977), in which the Court held that a third party held liable for damages to a serviceman cannot recover an indemnity from the United States if the serviceman's claim against the United States would have been barred by *Feres*. The court of appeals noted (Pet. App. B-30 to B-31): "[Petitioner's] case differs from *Stencel* in that she seeks relief for an injury to herself rather than indemnity for losses due to injury to her father, but this does not change the substantive analysis: the [trial] court still [would have to] examine the Government's activity in relation to military personnel on active duty. It is precisely this type of examination the *Feres* doctrine seeks to avoid."

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[1]There appears to be no dispute that Daniel Monaco was engaged in active military service at the time he was injured. See Pet. App. B-3.

[2]Daniel Monaco does not seek further review in this Court. Pet. 2 n. 1.

2. The court of appeals correctly concluded that *Stencel Aero* controls this unusual case. In *Stencel Aero*, this Court identified three bases of the *Feres* doctrine. The principal basis is " '[t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for * * * negligent acts committed in the course of military duty * * *.' " *Stencel Aero Engineering Corp.* v. *United States, supra,* 431 U.S. at 671-672, quoting *United States* v. *Brown,* 348 U.S. 110, 112 (1954); see 431 U.S. at 676 (Marshall, J., dissenting); *United States* v. *Muniz,* 374 U.S. 150, 162 (1963). But "the effect of [an] action upon military discipline is identical whether the suit is brought by the soldier directly or by a third party." *Stencel Aero Engineering Corp.* v. *United States, supra,* 431 U.S. at 673. Every inquiry that might jeopardize military discipline in the context of Daniel Monaco's suit would have to be made to adjudicate petitioner's claim as well; because petitioner's claim depends on showing that the Army negligently exposed her father to excessive radiation, petitioner's trial would also place "at issue * * * the degree of fault, if any, on the part of the Government's agents and the effect upon the serviceman's safety" (*ibid.*).

A second basis for the *Feres* doctrine identified in *Stencel Aero* is the exclusivity of the remedies provided by the Veterans' Benefits Act of 1958, 38 U.S.C. 101 *et seq.* See 431 U.S. at 672-673; *Feres* v. *United States, supra,* 340 U.S. at 144. See also *Hatzlachh Supply Co.* v. *United States,* 444 U.S. 460, 465 (1980). The Veterans' Benefits Act "serves a dual purpose: it not only provides a swift, efficient remedy for the injured serviceman, but * * * also * * * provides an upper limit of liability for the Government as to service-connected injuries" (431 U.S. at 673). Here, as in *Stencel Aero*, "[t]o permit petitioner's claim would circumvent this

limitation, thereby frustrating one of the essential features of the Veterans' Benefits Act" (*ibid.*).

Finally, the Federal Tort Claims Act makes the government liable "in accordance with the law of the place where the [allegedly tortious] act or omission occurred." 28 U.S.C. 1346(b). The Court noted in *Feres* that Congress could not have intended variable state law to govern the " 'distinctively federal' " relationship between the government and servicemen (340 U.S.C. at 143, quoting *United States* v. *Standard Oil Co.*, 332 U.S. 301, 305 (1947)); "it makes equally little sense to permit th[e] situs [of an alleged tort] to affect the Government's liability to" a third party (*Stencel Aero Engineering Corp.* v. *United States, supra*, 431 U.S. at 672) such as petitioner.

Whenever a serviceman is injured while on active duty, others may be able to make claims for derivative injuries—for loss of companionship, loss of income, and similar injuries. As this Court in effect recognized in *Stencel Aero*—and as petitioner appears to concede (see Pet. 18)—to permit suits based on such claims would seriously undermine *Feres*, intruding into military affairs by forcing the litigation of precisely those issues that *Feres* was intended to preclude. The lower courts have consistently interpreted *Feres* and *Stencel Aero* to bar such claims. See, *e.g.*, *DeFont* v. *United States*, 453 F. 2d 1239 (1st Cir.), cert. denied, 407 U.S. 910 (1972) (loss of companionship and loss of income); *Harrison* v. *United States*, 479 F. Supp. 529 (D. Conn. 1979), aff'd, 622 F. 2d 573 (2d Cir.), cert. denied, 449 U.S. 828 (1980) (loss of consortium); *Wisniewski* v. *United States*, 416 F. Supp. 599 (E.D. Wis. 1976)

(marital disharmony).[3] Petitioner's complaint states a similarly derivative injury; there is no reason to attach significance to the fact that the injury allegedly resulted from petitioner's genetic relationship to a serviceman, instead of her economic or emotional relationship.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1982

[3]We believe the district court's interlocutory decision in *Hinkie* v. *United States*, 524 F. Supp. 277 (E.D. Pa. 1981), to be incorrect, and we have asked the district court to reconsider its decision or, in the alternative, to certify an interlocutory appeal. In *Sigler* v. *LeVan*, 485 F. Supp. 185 (D. Md. 1980), appeal dismissed, Nos. 80-1160 and 80-1202 (4th Cir. Apr. 29, 1980), the civilian plaintiffs alleged injuries resulting from an "unlawful search of their home" (485 F. Supp. at 194), not from a service-connected injury to a serviceman.

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